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10
11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13

14 FIREMAN'S FUND INSURANCE)
15 COMPANY, a foreign corporation a/s/o)
16 BASIC RESOURCES, INC. and GEORGE)
17 REED, INC., a foreign corporation,)

18 Plaintiff,

19 vs.

20 GERLING AMERICA INSURANCE)
21 COMPANY, a foreign corporation,)
22 Defendant.)
23)
24)
25)
26)
27)
28)

CASE NO.: 3:07-cv-06302-CRB

**DEFENDANT GERLING AMERICA
INSURANCE COMPANY'S OPPOSITION
TO PLAINTIFF FIREMAN'S FUND
INSURANCE COMPANY'S MOTION
FOR SUMMARY JUDGMENT**

Date: August 8, 2008
Time: 10:00 AM
Courtroom: 8

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

Plaintiff Fireman's Fund Insurance Company's ("FFIC") motion for summary judgment fails as a matter of law by its own terms. FFIC states unequivocally that the asphalt plant at issue was neither the "product" nor the "work" of Gerling's insured, Gencor, at the time of the explosion. While FFIC makes this assertion in an attempt to avoid policy exclusions, FFIC's assertion that the Plant was not Gencor's "product" or "work" also means that the Gerling policy does not provide coverage for FFIC's claims under the "Products-Completed Operations Hazard" ("PCOH") section. FFIC cannot meet its burden of proof that it is entitled to coverage under the Gerling policy and its motion for summary judgment must be denied.

With regard to the relevant policy exclusions, FFIC acknowledges that the undisputed facts support the application of Gerling's "Damage to Your Work" exclusion. That exclusion, therefore, bars coverage for FFIC's claims. FFIC's assertion that this exclusion should only preclude a portion of its total claimed damages has no support in law or fact. Similarly, FFIC's arguments against the application of the "Damage to Your Product," "Contractual Liability" and "Professional Services" exclusions also fail. Those arguments misapply Florida law and misstate the undisputed facts of the underlying action. FFIC accepted a premium from Reed and directly insured the risk of loss at issue in this case. FFIC accepted coverage for the risk and paid for the loss. FFIC now seeks to pass its risk on to Gerling, even though Gerling consistently took the position that it had no coverage obligation to Gencor, a position Gerling's insured never challenged. The Court should deny FFIC's motion for summary judgment.¹

¹ In footnote 3 of FFIC's Motion for Summary Judgment, FFIC also requests that this Court reconsider its April 3, 2008 Order striking FFIC's prayer for attorneys' fees. FFIC's does not fulfill the Court's procedural requirements for reconsideration, nor is its request timely. The request should be denied on these grounds alone.

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2. **ARGUMENT**

A. **FFIC Has No Standing to Challenge Gerling's Declination of Coverage**

FFIC cites Section IV, ¶ 3 of the Gerling policy as its basis for standing to bring this action.² It is not disputed that Gerling declined indemnity coverage to Gencor for the claims at issue. (Declaration of Thomas R. Beer in Support of Defendant Gerling America Insurance Company's Motion for Summary Judgment ("Beer Decl."), Exhibit C). As FFIC obtained neither an assignment of policy rights from Gencor to proceed against the Gerling policy, nor a direct judgment against Gerling that could be enforced here, FFIC has no standing to challenge Gerling's declination of indemnity coverage or to proceed with this action.

B. **Based on Its Argument That the Plant Was Neither Gencor's "Product" Nor "Work," FFIC Cannot Meet Its Burden of Proof That It Is Entitled To Coverage Under the Gerling Policy**

FFIC seeks to establish coverage under the PCOH section of the Gerling America Insurance Company ("Gerling") policy issued to Gencor Industries, Inc. ("Gencor"). FFIC's attempt to meet its burden of establishing, *prima facie*, that its claim falls within Gerling's basic coverage is anomalous, unsupported by the underlying facts, and, taken entirely on its own terms, fraught with internal inconsistencies.

Significantly, FFIC does not contend in its motion that its alleged damages were caused by any defect in the asphalt plant ("Plant") that exploded. In fact, FFIC makes no claim whatsoever based on the "product" prong of the PCOH. Rather, FFIC rests its entire coverage argument on the contention that Gencor's employee, Mr. Dixon, performed improper "work" on the Plant, which "work" FFIC contends was negligent, causing the explosion. Thus, FFIC bases its claim for coverage solely on the "work" prong of the PCOH. FFIC alleges that the PCOH is its only basis for recovery under the Gerling policy. To satisfy the PCOH's "completion" requirement, a prerequisite for coverage under either the "product" or "work" prongs, FFIC contends that Mr. Dixon was performing "work" that was already "complete," but merely required further "service," "correction"

² FFIC further cites the Court's May 20, 2008 Order. However, this Order, as Gerling reads it, did not hold that FFIC had "standing," it only denied Gerling's Motion for Judgment on the Pleadings based on a *non in personam* argument.

1 or "repair." This conclusion, obviously designed to fit the claim within the coverage provision of
 2 the PCOH while at the same time attempting to avoid certain policy exclusions, is supported by
 3 neither logic, evidence in the record, nor policy definitions. At a minimum, FFIC's factual
 4 assertions create triable issues of material fact, requiring that FFIC's motion be denied. FFIC's
 5 argument undermines its *prima facie* case for coverage, and indeed, its entire claim.

6 **(1) FFIC's factual basis for its coverage argument**

7 FFIC takes the position that:

8 . . . Gencor sold and delivered component parts to FFIC's Insureds . . . for their
 9 subsequent construction and use of a 12,000 lb hot asphalt batch plant George
 10 Reed built the asphalt plant with its own forces and Gencor was not involved in
 11 construction of the plant. Gencor agreed to provide 'field engineering service' to
 12 make the initial calibration of the equipment and to train the operator in the
 13 calibration and production process including the plant's computerized temperature
 14 control system A problem was encountered with the computerized temperature
 15 control system. In an effort to correct that problem, Mr. Dixon attempted a 'dry run'
 16 during which he 'electronically bypassed' the exhaust fans and the main gas feed
 17 line. Unfortunately, Mr. Dixon unwittingly energized the main gas line allowing
 18 propane to enter the 'drum' and when he electronically 'lit the burner' the plant
 19 exploded.

20 (FFIC MSJ, p. 3, lines 5-27 [FFIC's citations to sources omitted.]). FFIC argues that Mr. Dixon's
 21 negligence during his service visit caused the explosion of the Plant.

22 FFIC then argues that:

23 In the underlying case, there was no evidence at trial that established that any
 24 'product' manufactured by GENCOR was 'defective' or that there was a 'defect' in
 25 the component parts sold by GENCOR. Quite the contrary, FFIC withdrew all of its
 26 pretrial claims asserting 'products liability' theories. The only evidence adduced at
 27 trial established that the explosion and resulting property damage to the completed
 28 plant occurred during the course of Calvin Dixon's servicing/calibrating of the
 temperature control system and was caused by his *failure to use due care* rather than
 a 'product defect.'

(*Id.*, p. 16, line 27, p. 17, lines 1-7 [Emphasis supplied, FFIC's citations to sources omitted.]).

FFIC commits to the factual position that:

In addition to the fact that no defect in any product caused any property damage, the
 completed plant was neither Gencor's 'product' nor 'work.' Gencor did not build
 the plant. Gencor did not sell a fully-assembled plant to FFIC's insureds, just
 component parts. The plant's construction was completed before Calvin Dixon
 arrived to 'service', 'correct' or 'repair' the temperature control system which was
 the 'work' out of which the explosion arose. The fully-assembled plant was never
 the work or product of Gencor.

(*Id.*, p. 17, lines 9-20 [FFIC's citations to sources omitted.]).

By way of (consistent) limitation, FFIC recognizes that:

The physical damage to the finished plant caused extensive loss of use of the plant and additional expenses delineated in the Final Judgment and exhibits which in no way was part of any 'work' performed by Calvin Dixon. Calvin Dixon's 'operation' at the time of the explosion resulted in direct damage to the Control Center, resulting in \$50,000.00 for replacement costs. The remaining \$929,787.00 in physical damage is related to the remainder of the plant, including demolition, new erection, etc.

(*Id.*, p. 18, lines 21-27 [FFIC's citations to sources omitted.]).

In sum, the factual basis upon which FFIC builds all of its coverage theories is that Gencor's "product" was solely component parts, and that the cause of the explosion was Gencor's employee's negligent work. Stated otherwise, according to FFIC, the Plant, which was not Gencor's product, exploded.

None of FFIC's factual allegations, nor its characterizations of relevant definitions of "product" in the Gerling policy or the written contract between Gencor and George Reed, are accurate.³ FFIC's arguments fatally undermine its *prima facie* coverage case.

(2) FFIC's coverage position

FFIC claims:

The property damage, lost profits and additional expense damages awarded to FFIC are 'covered losses.' Under the facts adduced in the Underlying Action, neither the Exclusions nor any miscellaneous policy provisions raised by Gerling are applicable and none operate to deny or otherwise exclude FFIC's Claim for Relief. Gerling's CGL policy provides \$1,000,000.00 in PCOH coverage to satisfy the Underlying State Court Judgment along with coverage for prejudgment interest, post judgment interest on the full judgment amount plus Costs Awarded to FFIC per the Policy's "Supplementary Payments Provision" (SPP).

(FFIC MSJ p. 6, lines 21-27, p. , lines 1-3 [FFIC's citations to sources omitted.]).

At p. 7, lines 8-23 and p. 8, lines 1-8 of its MSJ, FFIC cites the Gerling PCOH definition:

14. Products-completed operations hazard

- a. Includes all 'bodily injury' and 'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work' except:

- (1) Products that are still in your physical possession; or

³ The written contract between Gencor and George Reed states that it is for the sale of a "12,000 Lb. Stationary Batch Plant," not simply the components. Beer Decl., Ex. A.

(2) Work that is not yet been completed or abandoned. However, 'your work' will be deemed completed at the earliest of the following times:

...

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

Applying the provisions above, FFIC concludes:

FFIC's Insureds sustained 'property damage' as defined in the Gerling policy which occurred away from premises owned or rented by Gencor. The property damage occurred when the batch plant was operable and otherwise complete with the exception of Calvin Dixon's 'service', 'correction' or 'repair' of the temperature control system. As stipulated pretrial, at the time of the explosion, Gencor had delivered all the equipment called for in the contract. Basic Resources/George Reed personnel had completed erection and installation of the equipment. Based upon trial testimony, the plant had been certified by the State of California and was operational as of April 18, 2001, before the explosion. Subsection (2)(c) of the PCOH definition is satisfied and covers this loss subject to the limitation set forth in SECTION I of the policy which states:

(FFIC MSJ, p. 8, lines 9-19 [FFIC's citations to sources omitted.]).

Accordingly, as quoted above, *FFIC contends* that the product, *i.e.*, the unassembled components originally delivered by Gencor, was complete, but that the property damage occurred while Mr. Dixon was servicing, correcting, or repairing the temperature control system (*i.e.*, the "work"). FFIC appears to contend, however, that this "work" was complete, by virtue of (FFIC's reading of) Subsection (2)(c)'s specification that "work" is complete when it has been put to its intended use; or by the proviso following (2)(c), which specifies that "work" is complete when it was otherwise complete but might need some further service, maintenance, correction, repair, or replacement.

(3) Analysis of FFIC's coverage position

FFIC makes wildly inconsistent factual assertions as its basis for coverage. First, FFIC unequivocally states, above, that the "work" was the operation performed by Calvin Dixon in servicing, correcting, or repairing the temperature control system. Elsewhere, also quoted above,

1 FFIC states that the “work” was complete, with the exception of Calvin Dixon’s service, correction,
2 or repair. Lastly, FFIC contends Mr. Dixon’s “work,” if that in fact is the “work,” *was* complete
3 because, pursuant to the applicable PCOH provision, that “work” had been put to use but may have
4 needed some further correction, repair, or replacement. Is the “work” that FFIC claims as the basis
5 for coverage the components Gencor delivered, the Plant, the temperature control system, or Calvin
6 Dixon’s calibration and testing? FFIC variously appears to assert all of these mutually inconsistent
7 possibilities, and never settles this question. Rather, FFIC skips around these options, attempting to
8 support whichever conclusion it is arguing at the moment.

9 FFIC appears to have backed itself into a corner. FFIC absolutely (and wrongly) dismisses
10 the notion that the asphalt plant is the “product,” and simultaneously argues that Mr. Dixon’s visit
11 constituted “work.” Under that theory, FFIC must satisfy the “work” prong of the two-pronged
12 definition in the PCOH for coverage to exist. It cannot. FFIC insinuates, but cannot support with
13 any evidence, that the “work” was some initial, earlier calibration and testing by Gencor, which
14 became complete once the batch plant was operable. FFIC fails even to suggest, much less support
15 with any facts, any visit by Mr. Dixon or any other Gencor employee after delivery of the Plant and
16 before Mr. Dixon’s visit during which the Plant exploded. To support its theory, FFIC would then
17 need to prove that while Mr. Dixon’s visit to calibrate and test, which allegedly caused the
18 explosion, was “work,” it was essentially *remedial* “work.” The unspoken – and unsupported –
19 assumption is that there was some earlier work that Mr. Dixon remediated. By operation of
20 Subsection 2(c) of the Gerling policy, remedial work would not change the fact that some earlier
21 “work” was complete when it was initially performed and put to use. FFIC has not, and cannot,
22 assert that any such earlier work was ever performed. In fact, Mr. Dixon’s work, when the Plant
23 exploded, was ongoing, not remedial.

24 In sum, FFIC fails to bring its claim for coverage within the ambit of the PCOH. Florida
25 law is consistent with the overwhelming majority of jurisdictions in holding that the insured has the
26 initial burden of proving that the alleged loss falls within a policy’s initial grant of coverage. Then,
27 and only then, does the burden shift to the insurer to show that an applicable exclusion takes the loss
28

1 out of coverage. *See Castillo v. State Farm Fla. Ins. Co.*, 971 So.2d 820, 824 (Fla. 3d DCA 2007);
 2 *Herrera v. Catatumbo*, 844 So.2d 664, 668 (Fla. 3d DCA 2003); *Assurance Generale de France v.*
 3 *Catchcart*, 756 So.2d 1055, 1058 (Fla. 4th DCA 2000); *Hudson v. Prudential Property and Cas.*
 4 *Ins. Co.*, 450 So.2d 565, 568 (Fla. 2d DCA 1984); *U.S. Liability Ins. Co. v. Bove*, 347 So.2d 678,
 5 680 (Fla. 3d DCA 1977); *Phoenix Ins. Co. v. Branch*, 234 So.2d 396, 398 (1970).

6 FFIC has not met this burden.

7 **C. FFIC's Factual Admissions Support the Application of the "Damage to Your**
 8 **Work" Exclusion**

9 FFIC alleges that none of the Gerling policy exclusions apply, but plainly contradicts this
 10 allegation and makes factual admissions that support the application of the "Damage to Your Work"
 11 exclusion:

- 12 • "In this case, the 'work' performed by Gencor through Calvin Dixon at the time of
 13 the explosion was limited to service on the Control Center electrical system
 14 including the temperature controls."
- 15 • "Calvin Dixon's 'operations' at the time of the explosion resulted in direct damages
 16 to the Control Center, resulting in \$50,000.00 for replacement costs."⁴

17 (FFIC MSJ, Section IV, subsection 4, p. 18, lines 7-9 and 24-25).

18 In making these assertions, FFIC appears to acknowledge that the "Damage to Your Work"
 19 exclusion might apply, but attempts to artificially limit its scope. FFIC claims that Mr. Dixon was
 20 only performing "work" to the Control Center of the Plant at the time of the explosion, and
 21 therefore, the exclusion should only preclude coverage for the damage to the Control Center, and
 22 not for the rest of the Plant. This extremely narrow interpretation of the exclusion is contrary to the
 23 very facts that FFIC has asserted in its own brief:

24 . . . service tests of the electrical system [of the Plant] were being performed by
 25 Gencor employee, Calvin Dixon. As part of those tests, Mr. Dixon electronically

26 ⁴ FFIC makes this bald assertion regarding the \$50,000 "replacement costs" of the Control Center
 27 without any citation to actual evidence. In fact, the written contract between Gencor and George
 28 Reed is for the sale of a "12,000 Lb Stationary Batch Plant," and does not contain any cost
 breakdown for individual component parts, and contemplates the sale of an entire Plant. Beer Decl.,
 Ex. A.

bypassed the system exhaust fans and he attempted to electronically bypass the main gas feed line prior to electronically operating the main burner. When Mr. Dixon electronically 'lit the burner' the plant exploded. As a result of the explosion and the property damage it caused, [FFIC's insured] incurred losses for damage to the facility.

(FFIC MSJ, Section III. p. 2). FFIC fails to cite *any* legal authority, from Florida or elsewhere, that has applied or approved of FFIC's proposed distorted interpretation of the "Damage to Your Work" exclusion.

The "Damage to Your Work" exclusion precludes coverage for property damage to the "work" of the insured arising out of it or any part of it. The Gerling policy defines "your work" as "work or operations performed by you or on your behalf." In this case, the scope of Gencor's "work" is defined by its contractual obligations under the written contract between it and George Reed.⁵ Per the contract, Gencor performed "work" in manufacturing and delivering the Plant to George Reed. Additionally, Gencor's "work" included the contractual obligation to perform "field engineering service" to the entire Plant, which included:

- initial calibration
- start-up operation
- shut down
- clean up of the system

Beer Decl., Exhibit A. It is undisputed that Mr. Dixon had been performing this extensive "work" on the entire Plant in fulfilling Gencor's contractual duties. (Defendant Gerling America Insurance Company's Request for Judicial Notice in Support of Motion for Summary Judgment ("RJN"), Ex. 2, Transcript of Proceedings, Vol. 2, 183:3-215:20.) Accordingly, FFIC's contention that Gencor's "work" should be limited solely to the Control Center, or any other of the many parts that comprise the Plant, has no factual or legal support whatsoever.

Additionally, the plain language of the "Damage to Your Work" exclusion precludes coverage for all property damage (which encompasses loss of use) to the work of the insured that

⁵ As all the damages at issue in this case arise out of FFIC's breach of contract claim against Gencor, FFIC cannot dispute that the written contract controls the scope of Gencor's "work" with regard to the Plant.

1 “arises out of” the work or operations of the insured, or any part of it. The phrase “arising out of” is
2 broadly interpreted under Florida law:

3 [t]he general consensus [is] that the phrase ‘arising out of’ should be given a broad
4 reading such as ‘originating from’ or ‘growing out of’ or ‘flowing from’ or ‘done in
5 connection with’ – that is, it requires some causal connection to the injuries suffered,
6 but does not require proximate cause in the legal sense.

7 *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So.2d 528, 535 (Fla. 2005) (quoting *Fed. Ins.*
8 *Co. v. Tri-State Ins. Co.*, 157 F.3d 800, 804 (10th Cir. 1998)). FFIC has alleged that Mr. Dixon’s
9 actions caused the explosion, and that as a result of the explosion, FFIC’s insureds incurred losses
10 that are at issue in this action. Accordingly, FFIC cannot now dispute that all damages at issue
11 originated or flowed from Mr. Dixon’s “work” that allegedly caused the explosion. Given FFIC’s
12 assertions that acknowledge the applicability of the “Damage to Your Work” exclusion, the
13 undisputed fact that Mr. Dixon was performing “work” on the entire Plant, and the broad scope of
14 the “arising out of” language under Florida law, all of FFIC’s claim for damages is precluded by
15 this exclusion and FFIC’s motion for summary judgment fails as a matter of law.

16 **D. FFIC’s Own Claims in the Underlying Action Confirm the Application of the**
17 **“Damage to Your Product” Exclusion**

18 While FFIC asserts that the Plant was not Gencor’s “product” following assembly by
19 George Reed,⁶ FFIC also argues that the “Damage to Your Product” exclusion⁷ should not apply

20 ⁶ FFIC cites *Broward Marine, Inc. v. Aetna Ins. Co.*, 459 So.2d 330 (1984) and *Cotton States Mut.*
21 *Ins. Co. v. Norell Heating & Air Conditioning Co., Inc.*, 370 So.2d 270 (Ala. 1979) for the
22 proposition that the Plant was no longer Gencor’s “product” or “work.” However, neither case
23 addresses the issue of whether an item is no longer considered an insured’s “product” or “work” for
24 coverage purposes because it was assembled by another party. *Broward* addressed the issue of
25 whether a product remains the insured’s “product” if corrective work is later performed on it.
26 *Broward*, 459 So.2d at 331. *Cotton States* involved the installation of an air conditioning system in
27 1965 and subsequent work done on it on 1976. *Cotton States*, 370 So.2d at 273. Accordingly, both
28 cases are distinguishable and do not support FFIC’s argument. Gencor contracted to sell an entire
Plant, manufactured the Plant, delivered all parts of the Plant and provided the assembly plans. The
mere assembly of the Plant by George Reed did not materially change the Plant as sold by Gencor.
As such, the Plant was still Gencor’s “product” at the time of the explosion.

⁷ FFIC argues that the “Damage to Your Product” and “Damage to Your Work” exclusions should
be considered “business risk” exclusions. FFIC MSJ, pp. 14-16. FFIC fails to cite any Florida case
that labels or treats these exclusions in the manner FFIC’s advocates. Instead, FFIC relies on
Maryland Cas. Co. v. Reeder, 221 Cal.App.3d 961, 969 (1990) and *Hamilton Die Cast, Inc. v.*
United States F. & G. Co., 508 F.2d 417, 419-20 (1975), cases addressing the issue of “property
damage” under the “Impaired Property” exclusion in CGL policies. This discussion has no
relevance to the “Damage to Your Product” or “Damage to Your Work” exclusions, or whether

1 because FFIC did not allege a defect to the Plant. FFIC cites to *Rad Source Tech., Inc. v. Colony*
 2 *National Ins. Co.*, 914 So.2d 1006 (2005) in support. FFIC misstates its own claims from the
 3 underlying action, and mischaracterizes the holding in *Rad Source*, which is does not support
 4 FFIC's position.

5 FFIC makes the unsupported assertion that "[u]nder Florida law, the 'Your Product'
 6 exclusion is inapplicable where there is no evidence that the property damage was caused by a
 7 product's defective manufacture, *i.e.*, from a defect within the product itself." (FFIC MSJ,
 8 Section IV, subsection 4, p. 16, lines 24-25). The court in *Rad Source* held that the "Damage to
 9 Your Product" exclusion applied to situations "wherein the product itself is defective⁸," and also
 10 found that the claimant had "not allege[d] that the [product] was defectively manufactured or that a
 11 defect within the machine caused the damage." *Rad Source*, 914 So.2d at 1009. In its motion,
 12 FFIC claims to have abandoned and waived any claim based on any defect in Gencor's product. To
 13 the extent this abandonment or waiver is not the case, then the "Damage to Your Product" exclusion
 14 applies based on FFIC's numerous allegations of defect in the underlying complaint. In this case,
 15 FFIC did make specific product defect allegations in its complaint against Gencor in the underlying
 16 Florida state court action:

- 17 • Gencor breached its contractual obligations by "[f]ailing to provide an Asphalt
- 18 Batching System guaranteed to meet all existing state specifications"
- 19 • Gencor breached its contractual obligations by "[f]ailing to provide a safe ignition
- 20 system"

21
 22
 23 either of these exclusions is inapplicable to the facts of this case. Additionally, these exclusions are
 24 not dependent upon each other but must be analyzed independently of each other. *See J.G.A. Const.*
Corp. v. Charter Oak Fire Ins. Co., 414 N.Y.S.2d 385, 387-88 (1979) (holding that product

25 ⁸ The *Rad Source* court makes this holding regarding the need for allegations of defect without any
 26 citation to or support from prior caselaw. *Rad Source*, 914 So.2d at 1009. Other courts have held
 27 that the "Damage to Your Product" exclusion is not limited to cases in which the product was
 28 defective due to the scope of the phrase, "arising out of." *See, e.g., Beretta U.S.A. Corp. v. Federal*
Ins. Co., 117 F.Supp.2d 489, 492-94 (D. Md. 2000), *aff'd*, 17 Fed. Appx. 250 (4th Cir. 2001).
 Additionally, no cases have cited *Rad Source* for its holding regarding the "Damage to Your
 Product" exclusion.

- 1 • Gencor breached its contractual obligations by “[f]ailing to provide a safe burner
- 2 management system”
- 3 • Gencor breached its contractual obligations by “[f]ailing to provide a safe ventilation
- 4 system”
- 5 • Gencor breached its contractual obligations by “[f]ailing to provide a complete
- 6 product of merchantable quality”
- 7 • Gencor breached its contractual obligations by “[f]ailing to provide products free
- 8 from defects in workmanship and material”
- 9 • Gencor committed negligence by “design[ing], manufactur[ing], and assembl[ing] a
- 10 Plant that among other things contained a faulty starting and ventilation system that
- 11 was prone or subject to failure, and/or an ultimate explosion thus creating a
- 12 dangerous condition”
- 13 • Gencor committed negligence by “[f]ail[ing] to adequately examine or recognize any
- 14 known defects or existing problems with the ignition or ventilation systems of the
- 15 Plant involved in this action”

16 (Defendant’s Judicial Notice in Support of Motion for Summary Judgment (“RJN”), Exhibit 3,
 17 ¶ 11(b), (c), (d), (e), (n), (o), ¶ 46(a), (i)). Accordingly, the *Rad Source* case does not support
 18 FFIC’s arguments regarding the “Damage to Your Product” exclusion in this case.

19 Additionally, FFIC cannot deny that the explosion of the Plant was not caused by any
 20 outside source, but rather came solely from within the Plant itself. RJN, Ex. 7, Transcript of
 21 Proceedings, Vol. 7, 967:19-969:7. Evidence suggests that gas accumulated inside the Plant, was
 22 not purged prior to ignition, and exploded. *Id.* As such, it cannot be disputed that the damages to
 23 the Plant arose out of an explosion that occurred from within the Plant. As the “Damage to Your
 24 Product” exclusion precludes coverage for damages that “arise out of [the product] or any part of
 25 it,” this exclusion applies to bar coverage to FFIC’s claims.

1 **E. FFIC Misapplies Florida Law on the “Contractual Liability” Exclusion**

2 FFIC again misstates the *Rad Source* holding with regard to Gerling’s “Contractual
3 Liability” exclusion. FFIC claims that *Rad Source* supports its argument that Florida has adopted
4 the Wisconsin case of *American Family Mutual Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65
5 (Wisc. 2004) in differentiating between liability “incurred” and liability “assumed.” This is
6 incorrect.

7 In *Rad Source*, the court held that the “Contractual Liability” exclusion precludes coverage
8 for “damages by reason of the assumption of liability in a contractual agreement.” *Rad Source*, 914
9 So.2d at 1008. The court found that the insurer failed to point out any language in the contract
10 between Rad Source and its customer wherein Rad Source assumed liability for property damage to
11 the product during shipment. *Id.* The court found that there was a disputed issue of material fact as
12 to whether Rad Source fulfilled its contractual obligation, and held that the trial court erred in
13 granting summary judgment based on this exclusion. *Id.* The *Rad Source* court interpreted the
14 “Contractual Liability” exclusion by its plain language and found that there was no provision in the
15 contract wherein the insured assumed liability. There was never a discussion of liability “assumed”
16 versus liability “incurred” as FFIC claims.

17 In the present case, the written contract between Gencor and George Reed contains an
18 express warranty provision in which Gencor “assumed liability” for damages to the Plant in the
19 event of defect. (Beer Decl., Ex. A, p. 40, ¶ 6.4). As stated above, while FFIC claims that it has
20 abandoned or waived any product defect claim against Gencor, in the event that this is not the case,
21 the contract’s warranty provision would be implicated and the “Contractual Liability” exclusion
22 should apply based on FFIC’s allegations of product defect in its complaint in the underlying
23 Florida state court action.

24 Furthermore, the *American Girl* case is based solely on Wisconsin law, and no Florida court
25 has adopted Wisconsin’s interpretation of the “Contractual Liability” exclusion. FFIC inaccurately
26 describes the Florida Supreme Court’s citation to *American Girl* in *U.S. Fire Ins. Co. v. J.S.U.B.*,
27 979 So.2d 871, 884 n.8 (Fla. 2007). The *J.S.U.B.* court never addressed the applicability of the
28

1 “Contractual Liability” exclusion, and only cited *American Girl* with regard to the issue of whether
 2 a breach of contract could be considered an “accident” or “occurrence” for purposes of coverage.
 3 *J.S.U.B.*, 979 So.2d at 884. This Court should interpret the “Contractual Liability” exclusion by its
 4 plain language, as did the *Rad Source* court, and find that it applies to the undisputed facts of this
 5 case.

6 **F. FFIC Misstates The Scope of the “Professional Services” Exclusion**

7 FFIC claims that the “Professional Services” exclusion is “very limited/restricted” because
 8 in its title, it refers only to engineers, architects and surveyors. However, this argument ignores the
 9 plain language of the exclusion itself, which states that it precludes coverage for property damage
 10 “arising out of the rendering of or failure to render *any professional services* by you or any
 11 engineer, architect or surveyor” (emphasis added). Accordingly, this exclusion applies to “any
 12 professional services” rendered by Gencor.

13 FFIC cites *Aerothrust Corp. v. Granada Ins. Co.*, 904 So.2d 470 (2005) in support of its
 14 contention that Mr. Dixon’s work on the Plant does not qualify as “professional services.” The
 15 *Aerothrust* court held that “hoist inspectors” did not qualify as providers of “professional services”
 16 because “only those inspection services which require specialized training should be considered
 17 professional services.” *Id.* at 472. The court further noted that hoist inspectors did not require any
 18 specialized training or experience, did not need a high school diploma, and were not subject to any
 19 standards of service. *Id.*

20 In this case, Mr. Dixon was sent by Gencor to provide “adequate field engineering service to
 21 assist and train [Reed’s] installation crew and operator in the proper manner to install and operate
 22 the equipment.” Beer Decl., Ex. A at p. 33. As Gencor’s field engineer, Mr. Dixon provided
 23 “on-site supervision for erection of all new equipment, [including] initial calibration, start-up
 24 operation, shut down and clean up of the system.” *Id.* Gencor ensured in the written contract with
 25 George Reed that it had “developed field-proven installation procedures . . . [whose] basic intent is
 26 to install the equipment in a safe manner through procedures that minimize damages to the
 27 equipment and/or injury to personnel.” *Id.*

1 Further, Mr. Dixon did have specialized training and experience, as well as many years of
 2 on-the-job training on electrical systems and asphalt plants. RJN, Ex. 2, 166:15-169:25. There is
 3 testimony that Mr. Dixon had performed field engineering services on approximately one hundred
 4 asphalt plants. *Id.*, Ex. 2, 188:18-189:4. Furthermore, field engineering services provided by
 5 Mr. Dixon and Gencor were so specialized that George Reed, which assembled the Plant, had to
 6 request that Gencor send its field service technician to maximize its production output, even after
 7 the explosion occurred. *See* RJN, Ex. 1, 125:10-17 (Wendell Reed, the President of CEO of George
 8 Reed testified that Reed continued to use Gencor employees after the explosion of the Plant because
 9 of Gencor's specialized knowledge with regard to Plant operations); 132:11-20 (Mr. Reed testified
 10 that "... our people would not be conversant with doing any repairs on that at all or any
 11 maintenance on it. We would always use outside experts, and they were the experts.").

12 Finally, FFIC argues that Mr. Dixon is not a "professional" under Florida law because he did
 13 not have a four-year college degree. However, FFIC fails to cite any cases which hold that the
 14 "Professional Services" exclusion can only be applied to employees who have a four-year college
 15 degree. The cases on which FFIC relies do not address the definition of "professional services" in
 16 an insurance context and are inapplicable here. *Pensacola Executive House Condo. Ass'n v.*
 17 *Baskerville-Donovan Engineers, Inc.*, 566 So.2d 850 (1990) (finding that engineer was a
 18 professional for purposes of professional malpractice statute); *Moransais v. Heathman*, 744 So.2d
 19 973 (Fla. 1999) (discussing application of statute of limitations for professional malpractice).

20 The facts prove that that Mr. Dixon provided "professional services" that required
 21 specialized training and experience. The "Professional Services" exclusion applies to preclude
 22 coverage for FFIC's claims.

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3. CONCLUSION

For these reasons, the Court should deny FFIC's motion for summary judgment.

Dated: July 18, 2008

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